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NOTES OF INDIAN CASES.

NATHU LAL *v.* RAGHUBIR SINGH, I. L. R. 48 All. 160.

The question in this case was as to whether a decree based on a compromise could be set aside by review on the ground that the compromise was secured by fraud or undue influence. There are numerous cases supporting the view that it could be so done but a complication has been introduced by the decision of the Privy Council in *Chhaju Ram* v. *Neki* (1) which holds that "the other sufficient reason" mentioned in O. 47, R. 1 must be *ejusdem generis* with those specifically mentioned. The question in this case was as to whether the earlier cases could stand in the face of the aforesaid decision. Mr. Justice Boys is of opinion that they could not and that the remedy by way of review was inadmissible in such a case unless the fraud or undue influence was accompanied by the discovery of new or important matter. Mr. Justice Sulaiman agreed in the order but based it on the ground apparently that the person defrauded with full knowledge of the facts affirmed the compromise and as such was precluded from getting it set aside. We are afraid Mr. Justice Boys lays down the rule a little too strictly. Viscount Haldane's language is " excusable failure to bring to the notice of the Court new and important matters or error on the face of the record". If it is only discovery of new matter or evidence that can justify a review, the other portion of the section becomes useless. As Mr. Justice Mukherjee says in *Kumar Gopika Raman Ray* v. *Mahar Ali* (2), the discretion of the Court in saying what is sufficient reason within the mean-

1. (1922) I L R 3 Lah. 127 : 43 M L J 532 (P C).
2. (1923) 39 C L J 247.

ing of O. 47, R. 1 is not so rigidly circumscribed that analogy must in every case be discovered between the two grounds. Tested by the language of Lord Haldane, fraud of which a party is not aware, or undue influence which a party is unable to shake himself from, coercion which precluded a man from representing to the Court the true state of affairs, negligence of the guardian which led to a wrong decision or to a bad compromise or for the matter of that an excusable failure to appear would all be cases of excusable failure to bring a matter to the notice of the Court. It is certainly not clear on the section that wrong decision on the *merits* alone can be corrected by this process and not also irregular procedure. [Cf. *Alamelu Ammal* v. *Rama Aiyar* (3) where signing a compromise in ignorance of its contents owing to the fraud of an agent was held such new matter]. If fraud that has been already discovered, undue influence from which party has shaken himself away or coercion that has ceased to operate, is not brought to the notice of the Court, that circumstance alone might in most cases justify the inference of an election to affirm the transaction.

HARCHAR DAT *v.* MAQSUD ALI, I. L. R. 48 All. 166.

A man was accused before a Magistrate with offences under Ss. 395, 323 and 330. The Magistrate proceeded to inquire into the offences under Chap. XVIII of the Criminal Procedure Code and passed an order of discharge and along with it made an order for compensation. The justification given by the Magistrate was that, of those offences, that under S. 323 was one triable by him. He relied on *Mahaganam Venkatrayar* v. *Kodi Venkatrayar* (4). Mr. Justice Sulaiman based his decision reversing the order on the ground that as a matter of fact the Magistrate proceeded to inquire into the offence as one triable by the Court of Sessions and also discharged the accused in the course of such inquiry. He treated the accusation as one for the bigger offence and proceeded and it was not open to him to proceed as if the accusation was in respect of the smaller offence. The section speaks of *hearing and accusation.* We should think hearing alone cannot be the test as laid down in *Mahaganam Venkatrayar* v. *Kodi Venkatrayar* (4) nor could accusation alone be the test.

3. (1922) 43 M L J 290. 4. (1921) I L R 45 M 29: 41 M L J 398.

The section requires both. Preliminary enquiry is not hearing and therefore the case under review is excluded. The mere fact that accusation of a major offence includes accusation of a minor one cannot justify the Court in awarding compensation. The object of the legislature in enacting S. 250 is to give the Magistrate power to award compensation in the case of petty offences—ostensibly and on the showing of the complainant, petty offences. The mere fact that the complaint is headed under certain sections of the Penal Code cannot conclude the matter. The question is what in fact the offence is —not what the accused thinks of it or the Magistrate thinks of it but what the Penal Code lays down. If the complainant charges the party with the bigger offence, he has not in fact charged him with the smaller also though in law, it might amount to it as well. The section has to do only with what the complainant has in fact done.

BISHESHAR PRASAD PANDE *v.* RAGHUBIR, I. L. R. 48 All. 168.

In this case the First Court returned a plaint for presentation to the proper Court holding it had no jurisdiction and on appeal its order was affirmed. Then a revision was filed in the High Court to revise the First Court's order directing return of the plaint. The Court was exercised over it but felt itself bound by the Full Bench decision in *Badami Kuar* v. *Dinu Rai* (1). The same question exercised the Madras High Court in *Atchayya* v. *Atchayya* (2) where the majority decide the question in the same sense, with this difference that the case under review dealt with the matter as a revision against the original order while the Madras Court had to do with a revision petition against the appellate order. The proper view of the matter is that as in cases of prohibition in England, if the Court by an error of law comes to a wrong decision on a question of jurisdiction the High Court must have jurisdiction to interfere.

RAM SARUP *v.* GAYA PRASAD, I. L. R. 48 All. 175.

The question in this case was whether the High Court would revise an appellate order directing the setting aside of an *ex parte* decree. The two points on which there was some conflict in the Allahabad High Court were—whether such a

1. (1886) I L R 8 All 111. 2. (1912) 24 M L J 112.

proceeding was a case; secondly, whether by reason of the fact that the order could be interfered with in second appeal under S. 105, Civil Procedure Code, the order ought not to be interfered with. On the first point, the Full Bench held that it was a case; on the second point that the order was one that did not affect the decision on the merits and therefore could not be attacked in second appeal. The Madras High Court has been taking a different view as to the proper interpretation to be placed on the words "affect the decision". Notwithstanding that, revision petitions have been entertained against such orders [*Venkatrama Aiyar* v. *Nataraja Aiyar* (1), *Neelaveni* v. *Narayana Reddi* (2), *Karuppayee* v. *Chinnammal* (3) and *Gopala Chetti* v. *Subbier* (4)]. The fact is that the existence of other remedies has never been considered an absolute bar to the exercise of jurisdiction under S. 115. However, the uncertainty that exists in this matter gives the revisional jurisdiction something of the dubious reputation of the Chancellor's jurisdiction. The interpretation put by the Allahabad High Court is strained, though it has the support of the Calcutta High Court. The language may be contrasted with that in S. 100 which requires that the defect in procedure should have affected the decision on the merits. Even on the interpretation of the High Court, it is difficult to see why giving opportunity to adduce evidence or refusing the same should not affect the decision on the merits quite as much as admitting inadmissible or irrelevant evidence and should not be a ground for interference.

The question before the Bench was as to whether the Court could set aside the decree on grounds other than those set out in O. 9, R. 13. The Bench following *Neelaveni* v. *Narayana Reddi* (2) and *Sheikh Kallu* v. *Nadir Bakhsh* (5) held that it could not do so.

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1. (1912) 24 M L J 235. 2. (1919) I L R 43 M 94 : 37 M L J 599.
3. (1914) 1 L W 537. 4. (1903) 26 M 604 : 13 M L J 308.
5. (1921) 19 A L J 907

BAI SHANTA *v.* UMRAO AMIR, I. L. R. 50 Bom. 162 (F. B.).

This decision of the Full Bench is important as bringing the Bombay view on the admissibility of the defence of absolute privilege of a witness or party in a judicial proceeding to a prosecution for defamation in this country into line with what is the correct rule and laid down by the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1). The Madras and Bombay High Courts had taken the view in *Queen-Empress* v. *Babaji* (2), *Queen-Empress* v. *Balkrishna Vithal* (3) and *In re Venkata Reddy* (4) that the English Common Law rule of absolute privilege was applicable to this country notwithstanding the express terms of S. 499 of the Indian Penal Code which is a consolidating enactment. The fallacy of engrafting an exception from the English Common Law or public policy to the provisions of a consolidating statute was pointed out by Telang, J., himself in *Queen-Empress* v. *Balkrishna Vithal* (3). This vicious rule of construction was set at rest after the demonstration of its absurdity from all points of view by the late Sir Asutosh Mookerjee, A. C. J., in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1). Before this decision became familiar, the Madras High Court had even gone the length of holding that the English Common Law rule of a private citizen's right of arresting an offender applied to this country notwithstanding the express provisions of S. 341 of the Indian Penal Code regarding wrongful restraint, *In re Ramaswami Aiyar* (5); and reliance was placed for this rule of construction on *In re Venkata Reddy* (4). Shortly afterwards, however, the question of the admissibility of a defence based on the English Common Law regarding an offence under the Indian Penal Code was referred to the Full Bench in *Gopal Naidu* v. *King-Emperor* (6) and the Full Bench approved of the principle laid down by Sir Asutosh Mookerjee in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1) and held that there can be no defence in this country of a private citizen's right to apprehend on the English Common Law and apart from the provisions of the Indian Penal Code or Criminal Procedure Code. This decision of the Full Bench negatived the principle of the decision in *In re Venkata Reddy* (4)

1. (1920) I L R 48 C 388.
2. (1892) I L R 17 B 127.
3. (1893) I L R 17 B 573.
4. (1912) I L R 36 M 216: 23 M L J 39 (F B).
5. (1921) I L R 44 M 913.
6. (1922) I L R 46 M 605: 44 M L J 655 (F B).

recognising absolute privilege of a party or witness in a judicial proceeding. After the decision of the Bombay High Court under notice, the Madras High Court has expressly overruled *In re Venkata Reddy* (4) in a case which has not yet been fully reported but has appeared in the notes of recent cases in 50 M. L. J. 38. It is thus satisfactory to find that there is now uniformity in the law on the subject in all the Indian High Courts.

SESHGIRI SHAMBHULINGAM *v.* MANJAYYA, I. L. R. 50 Bom. 160.

In this case a suit was brought for the recovery of possession of certain immoveable properties and the High Court decreed the suit and awarded mesne profits only from the date of its decree. The defendants applied for leave to appeal to the Privy Council but the value of the lands alone did not come up to ten thousand rupees and they had therefore to add up the value of the future mesne profits after the High Court's decree to make up that amount and the question arose whether they were entitled to do so. The learned Judges have held that the mesne profits after the High Court's decree should not be taken into consideration under cl. (2) of S. 110 of the Civil Procedure Code according to which it is the amount or value of the property as at the date of the decree of the High Court, that is the determining factor. This question was settled as early as 1860 by the Privy Council in *Gooroopersad Khoond* v. *Juggutchunder* (1) ; and for this purpose there can be no distinction between mesne profits subsequent to the High Court's decree and interest subsequent to that date. If, however, this case were to arise in Madras, although the ultimate decision would have been the same, the reasons for coming to the conclusion would have been different, because the Madras High Court would, on the authority of *Subramania Aiyar* v. *Sellammal* (2), be obliged to hold that a case of this description would fall under cl. (1) of S. 110 of the Code and could not therefore come under cl. (2) and as the value of the subject-matter of the suit in the Court of first instance did not come up to Rs. 10,000 leave ought to be refused. As pointed out by the Madras High Court in that case, giving full effect to the second clause of the section would render nugatory the limitation as to the value of the suit in the Court of first instance

1. (1860) 8 M I A 166.
2. (1915) I L R 39 M 843 : 30 M L J 317.

imposed by the first clause. This necessarily requires a restrictive interpretation to be placed on the second clause. In this connection, we may mention that the Patna High Court in *Maharaja Kesho Prasad Singh* v. *Shiva Saran Lal* (3) was inclined to the opinion that, if the matter were *res integra,* the Madras view would be preferable. Even the learned Judges in *Subramania Aiyar* v. *Sellammal* (2) have not been able to suggest any clear rule which will answer all cases and Mr. Justice K. Srinivasa Aiyangar leaves it open saying that in some cases there may be a difficulty in saying under which clause a particular case falls. As Sir Dawson Miller, C. J., remarked in *Maulvi Imamuddin Khan* v. *Kishundeo Narain Mahatha* (4), it requires a pronouncement of the Privy Council to settle the difference of views between the Madras High Court and the other High Courts. This difference is solely attributable to the Indian Legislature adopting a further requisite of the value of the suit in the first Court being Rs. 10,000 or upwards, a provision absent in most of the colonies for the purpose of the appealability to the Privy Council. Even in the matter of value of the suit in the Court of first instance, it is not clear whether it is as at the date of the plaint or at the date of the first Court's decree, that is contemplated by the section. *Subramania Aiyar* v. *Sellammal* (2) would seem to suggest that it should be as at the date of the plaint while *Raghunathasami Aiyangar* v. *Gopaul Rao* (5) would take it as at the date of the first Court's decree. It should therefore be easier for the legislature to clear up the language of S. 110 and put an end to the conflict of views on the question by bringing it into conformity with what prevails in most colonies.

LAL BAHADUR LAL *v.* KAMLESHAR NATH, I. L. R. 48 All. 183.

In suits to set aside sale of family property, cases where part of the consideration is found not for necessity, fall under four heads :—

(*i*) Where a very considerable part is found to be for necessity and the balance has been paid though no necessity is proved in the sense that that money was wanted for any particular binding purpose.

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2. (1915) I L R 39 M 843 : 30 M L J 317.

3. (1918) 3 P L J 317. 4. (1921) 6 P L J 246.

5. (1922) 43 M L J 622.

(*ii*) Where that balance is found borrowed for a purpose not binding.

(*iii*) Where the balance is not inconsiderable but bears a small proportion to the whole.

(*iv*) Where the balance forms the major portion.

In the first case the sale is upheld either on the ground that the balance may be presumed to have been also properly spent or on the ground that the sale could not be arranged just for the amount required and a few rupees this side and that would not matter and cannot affect the purchaser. [Cf. *Girdharee Lal* v. *Kantoo Lal* (1), *Jainarain* v. *Bhagwan* (2); see also *Thirumalaiappa Mudaliar* v. *Nainar Thevan* (3)].

In the second case, however, small the amount, the amount should be recoverable by the family for the purchaser was a party to the misapplication.

In the fourth case, there could be no question but that the purchaser could only get a charge.

In the third, there are some cases that have upheld the sale giving a charge the question being as to what is a small proportion. It will be found that in *Banwari Lal* v. *Mahesh* (4) on a sale for Rs. 2,000, 1,622 rupees were found binding, and nevertheless the Privy Council set aside the sale giving the alienee a charge. [*See* also *Dwarka Ram* v. *Jhulai Pande* (5), *Jainarain* v. *Bhagwan* (2) and *Sanmukh Pande* v. *Jagarnath Pande* (6)—for the other side see *Krishnan* v. *Govindan* (7)].

Even if the balance is considerable, if amount required could not be raised otherwise, the whole sale might be justified and the family might not be entitled even to a charge. This would occur only in exceptional cases for one of which see *Balakrishnadas* v. *Hiralal* (8) where a house was sold for Rs. 19,000 while the debts amounted only to Rs. 7,000 and yet the sale was upheld.

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1. (1874) L R 1 I A 321 at 332.
2. (1922) I L R 44 A 683.
3. (1922) M W N 804 (P C).
4. (1918) I L R 41 A 63 (P C).
5. (1923) I L R 45 A 429.
6. (1924) I L R 46 A 531.
7. (1921) 41 M L J 381.
8. (1918) I L R 41 A 338.

GORA CHAND HALDAR *v.* PRAFULLA KUMAR ROY, I L R 53 Cal. 166 (F B).

This decision of the Full Bench lays down that it is open to an executing Court to question the jurisdiction of the Court which passed the decree and refuse to execute it if there is a patent want of jurisdiction. We venture to think that this decision will not be received with the amount of consideration that it might otherwise command by the other High Courts, as the learned Judges have not discussed the question of the executing Court's power to question the jurisdiction of the Court which passed the decree on principle and even the leading decisions of the several High Courts were not, if the arguments are correctly reported, brought to the notice of the learned Judges, except the Full Bench decision of the Patna High Court in *Jungli Lall* v. *Laddu Ram Marwari* (1) and an attempt was made mainly to set at rest the conflict of decisions in Calcutta. If the matter has to be dealt with on principle, we venture to submit that the only questions which can properly come within the purview of an executing Court are generally those enumerated in S. 47 of the Code, *i. e.,* those relating to the execution, discharge or satisfaction of the decree and do not extend to questioning the decree on the ground of want of jurisdiction or on any other ground. To put it in other words, as the late Sir Asutosh Mookerjee observed sitting with Cuming, J., in *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) a proceeding to enforce a judgment is collateral to the judgment and therefore no inquiry into its regularity or validity can be permitted in such a proceeding. This of course does not prevent the judgment being questioned in a proper proceeding, such as by way of appeal or revision or by a separate suit or other proceedings. Far from the other High Courts taking a different view from what was laid down in *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) as erroneously stated in the order of reference in this case, they have adopted the same view as may be seen from *Hari Govind* v. *Narsing Rao Konher Rao* (3), so far as the Bombay High Court is concerned, and the Full Bench decision in Madras in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (4) and the cases of *Sami Mudaliar*

1. (1919) 4 P L J 240 (F B). 2. (1916) I L R 44 C 627.
3. (1915) I L R 38 B 194.
4. (1920). I L R 43 M 675: 39 M L J 203 (F B).

v. *Muthiah Chetty* (5) and *Vaithilinga Mudaliar* v. *Chidambaram Pillai* (6) following it. See also *Lahore Bank* v. *Ghulam Jilani* (7) which dissents from *Jungli Lall* v. *Laddu Ram Marwari* (1). The Allahabad High Court has followed *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) in *Raghunandan Prasad* v. *Ghulam Alauddin Beg* (8). In such a state of authority, the decision of the Full Bench under notice is not likely to be accepted by the other High Courts. As for the distinction that an apparent want of jurisdiction can be given effect to by the executing Court, apart from there being no principle in the distinction, it is at best a vague test because no judgment or decree will recite in terms the absence of jurisdiction and still proceed contrary to such recital. The matter will therefore necessarily rest on some amount of investigation of the facts or law or both apart from the decree itself; and it would therefore be difficult to say definitely to what extent such investigation may be legitimately carried and given effect to in execution.

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1. (1919) 4 P L J 240 (F B).
2. (1916) I L R 44 C 627.
5. (1922) 43 M L J 293.
6. (1925) 49 M L J 520.
7. (1925) I L R 5 L 54.
8. (1924) 22 A L J 464.

JAGAN MOHAN SARKAR *v.* BROJENDRA KUMAR CHAKRABARTI, I. L. R. 53 Cal. 197 (F. B.).

In this case the majority of the Judges of the Full Bench of the Calcutta High Court have held that a suit for the entire rent is maintainable against some of the heirs or legal representative of a deceased tenant alone without bringing on record all his heirs or successors-in-interest. That the questions raised are of considerable difficulty is evident from the fact that out of the five learned Judges who took part in the case two learned Judges have taken the contrary view and there are two conflicting lines of cases in the Calcutta High Court which have been collected together in *Mahendra Nath Bose* v. *Abinas Chandra Bose* (1). It is somewhat remarkable that even in England prior to 1923 it was not settled whether when a tenancy was vested by assignment in a number of tenants-in-common, each one of them was liable for the whole rent or only for a proportionate share of it. Indeed there were dicta of eminent Judges to the effect that in such a case a tenant-in-common was only liable for his share of the rent ; and we find the law stated in the same terms in Halsbury's Laws of England, Vol. XVIII, p. 590, after referring to *Gamon* v. *Vernon* (2). Since then in *United Dairies, Ltd.* v. *Public Trustee* (3) Greer, J. has considered the whole case-law on the question and expressed the view that a tenant-in-common in such circumstances is liable for the whole rent, though the exact point that arose for decision in the case was with reference to a covenant for repairs. In this connection it may perhaps be mentioned that in the case of joint tenants, it has always been understood that each one of them is liable for the entirety of rent ; and when the tenants claiming under the original tenant are entitled to and in possession of distinct parcels in severalty, each one of them is only liable for a proportionate share of rent of the entire holding owing to the privity of estate in respect of their distinct parcels of land. In the case of the heirs of the original tenant who are entitled to distinct but undivided shares therein, they are entitled to the holding as tenants-in-common, as there is no right of survivorship as between them and each can have a distinct share varying from that of the others and these are incidents consistent only with a tenancy-in-common and not a joint tenancy. If so, it is not clear why their liability to the landlord is joint, so as to compel him to sue them all together in one

1. (1921) 27 C W N 521. 2. (1679) 2 Lev 231.
3. (1923) 1 K B 469.

suit. It may be noticed that in the arguments in *Merceron* v. *Dowson* (4), a distinction was made between the liability of tenants-in-common under a lessee for rent and for damages under a covenant for repair, *i. e.*, that in the former case each one of the tenants-in-common may be sued separately and that it is otherwise for neglecting to repair. Again Greer, J., himself in the case referred to thinks that the liability of the original tenant and his representatives, meaning, apparently thereby, his legal representatives, is on the covenant itself and not by reason of privity of estate. If so, all covenants being in this country joint and several under S. 43 of the Indian Contract Act, a suit is maintainable for the whole rent against each one of the heirs alone without joining the others. We see therefore no reason for introducing the rule of joint liability in the case of the heirs of the original tenant with all the anomalous consequences illustrated in *King* v. *Hoare* (5) and condemned by Lord Penzance in *Kendall* v. *Hamilton* (6).

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4. (1826) 5 B & C 479.
5. (1844) 13 M & W 494.
6. (1879) 4 A C 504.

BRIJ RAJ *v.* RAM SARUP, I. L. R. 48 All 44.

It is well settled that a decree against a minor can be set aside not only on the ground of fraud but also on the ground of gross negligence on the part of the guardian. But as rightly pointed out in this case, it is not every negligence that will have this result. It must be negligence such as if avoided might have led to a different result. Mere fact that the guardian was absent or *ex parte* will not vitiate a decree unless there was an available ground of defence which he could have put forward. There is room for some difference of opinion as to on whom the burden of proof of showing the existence of such a ground or the reverse should lie. Negligence is a question which is to be decided with reference to the materials available to the guardian and it is possible that by the exercise of all the diligence in the world, the guardian is unable to put forward an existing defence. For instance, he may be a Court guardian and it may be the natural guardians or persons in the custody of the child might not put him in possession of the necessary facts in spite of his best efforts in that direction and the case may go for default and yet the decree would bind the minor, cf. *Hanmantappa* v. *Jivu Bai*(1).

MUHAMMAD SHAFIQ-ULLAH KHAN *v.* NUH-ULLAH KHAN, I. L. R. 48 All. 58.

The Privy Council has laid down that acknowledgment of sonship by a father in Muhammadan Law raises a presumption of marriage but being a presumption of fact and not *juris et de jure* it is, like every other presumption of fact, capable of being set aside by contrary proof. Until the claimant establishes his acknowledgment, the onus is on him to prove a marriage. Once he establishes an acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact. Where therefore there is evidence that the marriage is impossible, invalid or did not or could not have taken place, the presumption cannot avail.

NAGESHAR RAI *v.* NAND LAL, I L R 48 All. 70.

In this case, a mortgagee planted a mango grove on the land and there was no evidence of consent of the mortgagor to the planting. There was a recital in a later deed of simple mortgage of the

1. (1900) I L R 24 B 547.

existence of these trees but this was held insufficient to prove consent to its planting. What one is unable to understand is why the mortgagee should not have been permitted to cut and carry away the trees which were planted by him. In the case of lessees they are entitled to cut and remove them and it is difficult to see why the same rule should not apply to mortgagees. *"Qui quid plantatur solo cedit"* has never been accepted fully in India. The reason given, viz., that it might cause detriment to the land is hardly satisfactory. It was only a matter of some expenditure and could not be said to be impossible to free the soil of the roots which alone can be deemed to be a possible detriment in a case like this. In this matter the judgment seem to go against the Full Bench judgment in *Raghunandan Rai* v. *Raghunandan Pande* (1). There remains the further question of the mortgagee's right to compensation which is a point on which there is considerable conflict. See *Henderson* v. *Attwood* (2), *Dnyanu Laxuman* v. *Fakira* (3), *Rupan Singh* v. *Champa Lal* (4), *Rahmatullah Beg* v. *Yusuf Ali* (5), *Labhu Ram* v. *Abdulla* (6) and *Arunachella Chetti* v. *Sithayi Ammal* (7). Where accounts have got to be taken, there is not much trouble. We have the authority of the Privy Council in *Kadir Moidin* v. *Nepean* (8) for allowing the cost of such improvements if executed in the reasonable course of management.

TAJAMMUL HUSAIN *v.* BANWARI LAL, I L R 48 A 77.

The High Court in this case found in second appeal reversing the judgment of the Lower Courts that the evidence was sufficient to establish a custom. There has been considerable divergence of view as to the powers of the High Court to interfere in second appeal on a question of custom. A somewhat wide view was taken of the power of the High Court in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (9) but the Full Bench in *Kumarappa Reddi* v. *Manavala Goundan* (10) took a narrower view holding that the findings of actual facts from which the existence of custom is to be inferred are not open to question by the High Court but that the inference as to the existence and decision as to the validity of the custom are questions of law and open to reconsideration.

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1. (1921) I L R 43 A 638 (F B).
2. (1894) A C 150, 163.
3. (1921) I L R 45 B 1301.
4. (1914) I L R 37 A 81.
5. (1912) 10 A L J 124.
6. A I R 1923 L 587.
7. (1896) I L R 19 M 327.
8. (1898) I L R 26 C 1 (P C).
9. (1905) I L R 29 M 24 : 16 M L J 8.
10. (1917) I L R 41 M 374 : 34 M L J 104 (F B).

DARSHAN DAS *v.* BIKRAMAJIT, I. L. R. 48 All. 81.

On the death of one of the respondents in an appeal, is the whole appeal to be taken to abate or is it only to abate in respect of the interest of the particular defendant? Whatever scope for a different opinion there might have been on the old Code, on the wording of the present Code, there could be no question of the whole suit abating—for it is expressly stated now that the abatement shall be only as against the deceased defendant, whereas under the old Code the wording was "the suit shall abate." There may be suits, however, which cannot proceed in the absence of the deceased party and, in such cases, the effect of the abatement might be the dismissal of the appeal. We should think it grossly inaccurate to describe the dismissal of the appeal in such a case as one of abatement though such a language might have been appropriate under the old Code. It would be abatement so far as the deceased party is concerned and dismissal for non-joinder so far as the other parties are concerned. Under the present Code, except in those cases in which the suit cannot at all proceed against the other parties in respect of their interest, there would seem to be no justification for dismissing the whole suit. Where though the suit is one, the interest of each of the defendants or respondents is separate there could be no question and all the Courts are agreed that the suit would not abate. But where the decree is a joint one and the interests are not separate, this case as well as certain Calcutta cases seem to hold that the whole suit must abate as otherwise contradictory judgments will result. See *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (1). There seems to be no justification for the introduction of any general rule like that. Except in cases where O. 41, R. 4 applies and in such a case non-joinder is immaterial the rule above referred to does not obtain at all. Contradictory decrees are so often made in the same suit and that is an inevitable result of the rule of *res judicata* by reason of prior decision in the same suit or another suit. It could not be said that the suit could not go on in the first instance against only some; if it could go on in the first instance, it is inconceivable why it should not equally so on the death of one of the defendants. In the case of mortgage suits the Calcutta High Court has held that the suit can go on in the absence of some of the heirs of the original mortgagor and as against the interest of such as are on the record and for the proportionate share of the money. Why should it make a difference when one of those heirs dies after being once

1. (1919) 24 C W N 44.

made a party ? The Bombay High Court has taken a more consistent view in *Shankerbhai Manorbhai* v. *Motilal Ramdas* (2). There is nothing against a joint decree being passed in favour of the plaintiffs along, if necessary, with the representative not made a party in time. That Court has not felt itself precluded even in a partition suit from making such representative a party for the purpose of giving the plaintiff the relief he seeks, though not against the person so made a party. See *Lakhmichand Rewachand* v. *Kachubai Gulabchand* (3).

LAKHMI CHAND *v.* ANANDI, I. L. R. 48 All 313 : 51 M. L. J. 52 (P C).

In this case, two brothers who were members of an undivided Hindu family executed a document which they styled agreement by way of will by which right was conferred upon the widow of one to remain in enjoyment of his share during her life. While holding that as a will it was not binding; the Privy Council further hold that it might be supported as an arrangement with the consent of all the members then alive of the joint family which they further opine, would be binding even if other members should subsequently be born into the family. They support the arrangement by appealing to the principle that a member of a joint family may alienate his share with the consent of his co-parceners. They express agreement with the view of Wallis, C.J. in *Subbarami Reddi* v. *Ramamma* (4) that a father who is a co-sharer with the minor cannot give such a consent. That was a case where there were only the father and the minor son and the question was whether such arrangement could bind the son. It cannot be said that their Lordships shut the door upon considering such arrangements binding if really they are beneficial to the minor members and when there are other adult members of the family to represent them or for the matter of that if they should be properly represented by guardians. If, for once, the possibility of those arrangements is conceded, their validity also would seem to follow, granted the circumstances justify the course, to avoid the less desirable eventuality of a partition [see *Patrachariar* v. *Srinivasachariar* (5)]. The idea of a will with consent of the other members their Lordships consider to be inadmissible though the language used in *Brijraj Singh* v. *Sheodan Singh* (6) would seem to suggest the legal possibility of one.

2. (1924) I L R 49 B 118. 3. (1911) I L R 35 B 393.
4. (1920) I L R 43 M 824.
5 (1917) I L R 40 M 1122: 32 M L J 364.
6. (1913) 35 A 337: 25 M L J 188 (P C).

KISHAN DEI v. SHEO PALTAN, I. L. R. 48 All. 126.

This case is an illustration of the extent to which a Court has to go when instead of confining itself to the text or the clear implications of the text of the law it embarks upon a consideration as to what is blameworthy and what is not. If that were the test, one fails to understand why the Gandharva form is blameworthy at all. Pursuing that course, considering what the community considers blameworthy and what the Court should consider blameworthy and arriving at some compromise possibly between the two, the Court declares itself unable to say it is blameworthy and pronounces acting upon the presumption that the form is Brahma—that it is Brahma. When Manu declares that Panigrahana mantras are not intended for a woman who has been once married, to regard such a person as married in an approved form within the meaning of the very Smritikara who says that seems to be going too far. We do not believe that the text of Yajnavalkya as to inheritance to Stridhan property contemplates marriages necessarily to fall within the eight categories mentioned. Marriages may be one of those eight and may be some other kind and, when it is some other kind, the mode of inheritance is that prescribed for the Asura and Gandharva forms. In the case of Asura, the theory is that the wife does not, strictly speaking, cease to belong to the family of the father and as such the father and the relations of the father succeed in the absence of issue. The idea of change of gotra or family for a widow seems to be ludicrous and a question would necessarily arise as to the relations of which of her husbands should have preference to her property. A change of gotra by disposal by a person who has authority to do so is at the foundation of this rule of inheritance and would seem to exclude the widow marriage from it. It is not quite accurate to say that the Smritis do not contemplate a second marriage for women. Some at least of the kinds of Punarbhus seem to be remarried women and there is more than one text which permits a second marriage and Kautilya refers to a divorce in certain circumstances. We should fancy such cases appropriately to come within the other than the four stated "Prashasta" forms and to be governed by the rules of inheritance governing the named "Aprashasta forms."

FATIMA-UL-HASNA v. BALDEO SAHAI, I L R 48 All. 188 (F B).

Here the Full Bench takes the same view of the construction of O. 21, R. 89, as the Full Bench case of the Madras

High Court in *Sundaram* v. *Mausa Mavuthar* (1). In fact, this is the view taken by all the other High Courts. The High Court of Allahabad took the strange view that neither the judgment-debtor nor his alienee after the sale could apply to set aside the sale—which is overruled in this case.

BHAGWATI DAYAL *v.* DHAN KUNWAR, I. L. R. 48 All. 329.

The question as to what orders are final within the meaning of S. 109, Civil Procedure Code—in fact as to what is the test of finality—can hardly be said to be finally settled. The particular order in question in this case was one refusing to record a compromise. There could be no question that if the Court had ordered the compromise to be recorded, the case would have terminated and there would have been appeal though in *Salaman* v. *Warner* (2) the view taken were that such order, as in another contingency, would not have terminated the suit could not be regarded as final. The view taken in some cases in India [see *Khagendra Nandan Asram* v. *Sahayram* (3), *Saratmani Debi* v. *Bata Krishna Banerjee* (3), *Meghraj* v. *Bidyabati Koer* (5)] that an order which if it was the other way would have terminated the suit must be regarded to be final also has not found acceptance with all the Courts and is opposed to the decision in *C. T. Cogstad and Co.* v. *H. Newsum Sons and Co.* (6). The Bombay Court in *Shankar Bharati* v. *Narasimha Bharati* (7) held that such an order was only interlocutory. This view is supported by the decision in *Croasdell and Cammell, Laird and Co., Limited, In re* (8) where an order setting aside an arbitration on the ground of misconstruction of the order of reference was held to be not final. This view does not preclude the Courts in giving leave for appeal in proper cases but their Lordships say that such leave should be given only when the appeal is likely to determine finally the rights of parties—a test which, we apprehend, might bring the order within the category of final orders.

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1. (1921) I L R 44 M 554 : 40 M L J 497 (F B).
2. (1891) 1 Q B 734.
3. (1921) 25 C W N 896.
4. (1909) 10 C L J 336.
5. (1914) 21 C L J 279.
6. (1921) 2 A C 528.
7. (1922) I L R 47 B 106.
8. (1906) 2 K B 569.

RAM CHARAN LONIA *v.* BHAGWAN DAS MAHESHRI, I L R 48 All 443 (P C).

In this case, a Hindu father first executed a simple mortgage for necessity and then entered into two contracts of sale to pay off the mortgage one after the other. The mortgage provided for 8 1|2 per cent. compound interest. The High Court held that that was an exorbitant rate and allowed only 8 1|2 per cent. simple interest. Their Lordships were not prepared to hold that the interest was exorbitant without evidence merely because it was compound interest. The first contract fell through and then the vendee under the second contract brought a suit for specific performance and the question was whether the contract was binding.

Their Lordships while holding that the circumstances justified entering into a contract for sale and the terms so far as the price went were not objectionable, nevertheless held that the contract did not bind the other members of the family in the circumstances of the case inasmuch as there was already a contract in operation which made it possible and even prudent for the other side to put off performance of the second contract indefinitely with the result that the mortgage ate up the whole of the purchase money.

Another question that arose was as to the terms of the decree to be passed. The Sub-Judge had made a decree for specific performance and under that decree the plaintiff got into possession and discharged the mortgage. The question was whether the new situation thus created should be dealt with by the judgment though it was not strictly connected with the subject-matter of the suit. Their Lordships say that it might be dealt with and proceed to deal with it. They do not allow him the interest which the mortgagee would on their Lordships' view have been entitled to but they do not approve of the course taken by the High Court in disallowing all interest from the date of taking possession. Instead they treat him as a usufructuary mortgagee taking possession under an order of the Court not liable to account for the profits nor entitled to interest after taking possession. On the principle of subrogation, the vendee would have been entitled to interest at the mortgage rate. Their Lordships apparently regard that the Court has power even in such cases when justice demands such a course to regulate the extent to which the original contract should be enforced.

RAJ BAHADUR *v.* NARAIN PRASAD, I L R 48 All. 482.

Having regard to O. 22, R. 5, the decision of their Lordships in this case that it is not open to a party who is decided by the Court not to be a representative of a party in the suit to sue the other side in a separate suit for a declaration that he is and get relief on that footing seems to be undoubtedly right. But of course, it does not follow that when the decision is between two persons claiming as representatives that decision is conclusive as between them even as regards the subject-matter of the suit. *Parsotam Rao* v. *Janki Bai* (1), *Balabai* v. *Ganesh* (2) and *a fortiori* when the subject-matter is different, *Pakkran* v. *Pathumma* (3). As their Lordships point out in the last case "the question whether a person should be admitted as legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for decision in the suit itself. It is really a matter collateral to the suit and one that has to be decided before the suit itself is proceeded with. The Civil Procedure Code does not provide for an appeal against an order deciding the question though the repealed Code did." The last consideration is not conclusive no doubt on the question of *res judicata* (*see* S. 11, Expl. II), but it cannot be overlooked in deciding whether a conclusive effect could have been intended to be given to such an order. The determination is final so far as the purposes of the suit are concerned, *i. e.,* it is no longer open to the unsuccessful claimant to set up his title as representative as against the defendant with a view to getting the relief claimed in the suit and on the cause of action alleged in the plaint. But it does not preclude him from setting up the right as against the successful claimant and claiming the fruits of the litigation from him nor does it preclude him from setting up the same title as against the defendant in respect of a different cause of action or different subject-matter. The decision under consideration does not seem to notice the distinction and dissents from *Parsotam Rao* v. *Janki Bai* (1) which deals with this aspect of the question.

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1. (1905) I L R 28 A 109
2. (1902) I L R 27 B 162.
3. (1915) 25 M L J 279.

RAJENDRA NATH CHATTERJEE *v.* MAHES LATA DEBI, I. L. R. 53 Cal. 270.

The point that came up for consideration in this case is a short one, namely, whether a memorandum of cross-objections can be preferred by a respondent against one who is not a party to the appeal though he was a party in the Lower Court and whether the latter can be added as a party to the appeal for that purpose and the learned Judges have answered it in the negative. A similar view has been taken by the Patna High Court in *Bakshi Bindeswari Prasad* v. *Dheninder Das* (1). Though the point is a short one, its decision has not been uniform in the various High Courts ; and if it were to come up before the Madras High Court that Court would be inclined to decide it in the affirmative following its prior decision in *Ponnuswami Asari* v. *Palaniandi Mudali* (2) where the rules in O. 41 of the Civil Procedure Code have been subjected to a very careful examination. Even in Calcutta, the trend of judicial decisions on this question has not always been on a line with the case under review. Reference may be made in this connection to *Annud Chunder Goopto* v. *Mohesh Chunder Mozoomdar* (3) and *Pran Kishore Deb* v. *Mohamed Ameer* (4), which are to the contrary effect. We are not sure that the wide language of the terms of S. 348 of the Code of Civil Procedure of 1859 under which these cases were decided can be emphasised as empowering the Appellate Court to entertain a memorandum of objections even against a person who is not a party to the appeal, as in spite of such generality of expression a restricted meaning was given and it was held by the Calcutta High Court under that Code that a respondent could not prefer a memorandum of objections against another respondent. *Maharajah Tarucknath Roy* v. *Tuboor-un-nissa Chowdhrain* (5), *Goonomonee Dossia* v. *Parbutty Dossia* (6) and *Muhboob Ali* v. *Ali Zur Banoo Bibee* (7). Whatever might have been the correct view under the Code of 1859, with the enlarged powers of the Appellate Court to do justice under O. 41, R. 33 of the Code of 1908, we venture to submit that the Court is not incompetent to add a party in appeal even though it may be to enable a respondent to the appeal to prefer a memorandum of objections against him, and that the construction of the rules adopted in *Ponnuswami*

1. (1916) 2 P L J 162.
2. (1919) 11 L W 602.
3. (1864) 1 W R 229.
4. (1874) 21 W R 338.
5. (1866) 7 W R 39.
6. (1868) 10 W R 326.
7. (1868) 9 W R 78.

Asari v. *Palaniandi Mudali* (2) is more in consonance with the spirit of the present Code. While on this question, we would point out that the Madras High Court has taken a different view from that of the Calcutta High Court on a respondent's right of preferring a memorandum of cross-objections against another respondent. [*Muniswami Mudali* v. *Abbu Reddi* (8)].

UMASHASHI DEBI *v.* AKRUR CHANDRA MAZUMDAR, I L R 53 Cal. 297.

We are not sure that if in this case the plaintiff had not asked for a declaration that the execution purchase by the defendant was *benami* for him but had merely relied on his possession as the ground of his title and sought to recover possession from the defendant or for the confirmation of his possession, the learned Judges would still have held that the suit was barred by S. 66 of the Civil Procedure Code, although there are some observations in the judgment of Cuming, J. which tend to suggest that even such a suit would be barred. In such a case we venture to think that the plaintiff would be entitled to succeed as the ground of his claim would be his prior possession which is a good title in itself as against all persons except the real owner and the defendant would be bound to prove his superior title to the property and the plaintiff would not then be precluded from showing the *benami* nature of the defendant's purchase in reply when the latter sets up his execution purchase. It is perhaps possible that the opinion of the learned Judge is tinged by the view held by the Calcutta High Court that prior possession by itself is not a ground of title unless it comes within the terms of S. 9 of the Specific Relief Act, a view entirely opposed to the current of authority elsewhere in India and not accepted even in Calcutta without murmur. See *Naba Kishore Tilakdas* v. *Paro Bewa* (9), per Suhrawardy, J., one of the latest instances. The view that is generally accepted elsewhere was forcibly put forward by Bhashyam Aiyangar, J. in *Narayana Rao* v. *Dharmachar* (10), and has been the settled law in England since at least *Asher* v. *Whitlock* (11). If thus prior possession in the plaintiff by itself is a ground of title which has to be displaced by the proof of a better title by the defendant, there

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2. (1919) 11 L W 602. 8. (1915) I L R 38 M 705 : 27 M L J 740 (F B)
9. (1922) I L R 50 C 23. 10. (1902) I L R 26 M 514 : 13 M L J 146.
11. (1865) L R 1 Q B 1.

seems to be nothing in S. 66 of the Civil Procedure Code to preclude the real owner bringing such a suit against the certified purchaser and courts are not prohibited from trying an issue as to the *benami* nature of the purchase which would become relevant to the case on the plea of the defendant relying on his execution purchase. While on the one hand there is no warrant for placing a restricted interpretation on the terms of S. 66 limiting it to cases where the purchase is *benami* for the judgment-debtor, as pointed out in *Harish Chandra Guha* v. *Nripendra Kumar Chuckerbutty* (1), there is equally no warrant for widening its scope as was done in *Hanuman Pershad Thakur* v. *Jadu Nandan Thakur* (2) by investing the certified purchaser with full title to the property. If it were otherwise, the certified purchaser would not only be entitled to defend a suit based on the *benami* character of his purchase, but could also himself sue on foot of his execution purchase a position which has never been conceded to him. Indeed even in the case of *Bisham Dial* v. *Ghazi-ud-din* (3) it was pointed out by Strachey, C. J. that S. 317 of the Code of 1882 corresponding to S. 66 of the present Code should be strictly construed and that the only kind of suit that was barred by the section was the one brought against the certified purchaser *and based on the ground that the purchase was made on behalf of the plaintiff or his predecessor-in-title;* and the learned Chief Justice leaves open the case of a suit by the real owner based on his prior possession. It would thus seem to follow that whatever may be the correct decision of the case in *Sasti Churn* v. *Aunopurna* (4) on the facts of that case, the observations extracted from the judgment in that case in the decision under notice lay down, with all respect, the correct law on the question and a suit based on possession alone will not be barred by S. 66 of the Civil Procedure Code.

SRIPATI DATTA *v.* BIBHUTI BHUSAN DATTA, I. L. R. 53 Cal. 319.

In this case the learned Judges have laid down that there is a right of appeal under O. 43, R. 1, cl. (*s*) of the Civil Procedure Code against an order removing a receiver. Such an order is clearly not one falling within the terms of O. 40, R. 1 or R. 4 of the Civil Procedure Code against which only a right of appeal is provided. With all respect, we fail to

1. (1920) 24 C W N 1024.
2. (1915) I L R 43 C 20.
3. (1901) I L R 23 A 175.
4. (1896) I L R 23 C 699.

see how S. 16 of the General Clauses Act which merely empowers an appointing authority to remove the officer so appointed has any bearing on the right of appeal against an order removing him. On the other hand, there are two decisions of the Calcutta High Court and another of the Madras High Court in which it has been held that an order refusing to remove a receiver is not appealable. [See *Eastern Mortgage and Agency Co., Ltd.* v. *Premananda Saha* (1), *Ramdayal* v. *Motiram* (2) and *Ramaswami Naidu* v. *Ayyalu Naidu* (3)]. If these decisions which proceed on the language of O. 40, Rr. 1 and 4 and O. 43, R. 1, cl. (s) are correct, it would be difficult to reconcile them with the present case, because if an order removing a receiver is appealable, an order refusing to remove a receiver would seem to be likewise appealable. In the case of *Eastern Mortgage and Agency Co., Ltd.* v. *Premananda Saha* (1) referred to above, Mr. Justice Woodroffe, sitting with Coxe J., held that an order on an application for the removal of a receiver is not appealable. Apparently these decisions were not brought to the notice of the learned Judges in the present case. It is not therefore clear, what their decision would have been if these cases had been referred to.

PANCHAM *v.* ANSAR HUSAIN, I L R 48 All 457 (P C).

The question before the Privy Council in this case was as to whether when a document of mortgage fixed a date for payment but in the meanwhile also required an annual payment to be made in default of which the whole was to fall due, and there is default whether limitation begins to run on the default absolutely or only at the option of the mortgagee. Their Lordships state the point and recognise its importance. *Prima facie* they do not seem to be quite satisfied about the correctness of the Allahabad view that limitation starts from the default, but the plaintiff having framed his plaint on the footing that the cause of action arose on the default and that limitation was saved by certain payments and the same having been found against, their Lordships held that the plaintiff was precluded from raising the point that the cause of action arose on the date fixed for payment.

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1. (1914) 20 C W N 789. 2. (1915) 24 I C 863.
3. (1923) 46 M L J 196.

HOPE PRUDHOMME & CO. *v.* HAMEL AND HORLEY, LIMITED, I. L. R. 49 Mad. 1 (P. C.).

The question in this case was largely one of fact as to whether the respondents were merely agents or though ostensibly agents really purchasers acting independently which, as their Lordships observe, happens very often in modern business especially in the motor trade. Their Lordships held agreeing with the High Court that they were merely agents and that as really they acted on their own account as principals, the appellants were entitled to repudiate the contract. Their Lordships held on the evidence that the appellants had not ratified the transaction.

GOPALAKRISTNAYYA *v.* LAKSHMAN RAO, I. L. R. 49 Mad. 18 : 49 M. L. J. 590 (F. B.).

In this case, the Full Bench held, we think rightly, that a Memorandum of Appeal presented against a dead man might be amended in a proper case so as to make it an appeal against the legal representatives, though so far as the question of limitation goes, the appeal will date only as from the date of the amendment so that the Court will have to excuse the delay if time has expired by that time. We fail to appreciate why the Court should not amend the plaint also in a similar case provided the period of limitation has not expired. In the case of suits the Court has, of course, no power to excuse delay as in the case of appeals. The law has been laid down in a contrary sense in *Veerappa Chetty* v. *Tindal Ponnen* (1) and several cases following it though inconsistently enough, it has also been laid down in the case of execution petitions that such petitions amount to applications in accordance with law to execute or to take a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act.

VENKU SHETTITHI *v.* RAMACHANDRAYYA, I. L. R. 49 Mad. 29 : 49 M. L. J. 634.

Art. 134 of the Limitation Act has been the subject of much judicial controversy and one is hardly certain to have seen the last of it.

In this case, the defendant was a transferee from a mortgagee who claimed to be a vendee with an agreement to re-

1. (1907) I L R 31 M 86: 17 M L J 551.

sell and purported to sell the property absolutely alleging that by reason of the default of the vendor (mortgagor) in payment his title had become absolute. The question was whether to such a case Art. 134 applied. Their Lordships held it did. *Bona fides* is no longer a necessary condition for the application of the article. The knowledge that the transferor is a mortgagee would seem to be material only for the purpose of showing that what was intended to be transferred was only a mortgage interest or an interest whatever it is that the document confers. If it could be affirmed that the transfer is only of the interest under the document whatever that might be, the article would not apply. Between that case and the present where the party believed he had an absolute interest under a deed which in its proper construction was a mortgage and purported to transfer such absolute interest as conferred by that deed the distinction is somewhat fine but nevertheless real.

MAHARAJA OF VIZIANAGRAM *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, I. L. R. 49 Mad. 249 : 50 M. L. J. 391 (P. C.).

In a case somewhat analogous to the case under review *Arun Chandra Singh* v. *Kamini Kunwar* (1) their Lordships of the Privy Council held that an abatement of rent by reason of diluvion did not disentitle the patnidar from claiming the diluviated land when it re-formed *in situ* some years after. In the case of ryotwari proprietors in a similar situation, in the present case, their Lordships came to an opposite conclusion. The true explanation for the distinction lies apparently in the difference in the nature of treatment in the two cases. If the case was one of remission of rent which their Lordships point out could only be done by the Board of Revenue, the conclusion would have been different. Otherwise if the ryotwari proprietor retained his holding, he was bound to pay revenue. The only way he could get rid of his liability to pay it is by surrendering. If he ceased to pay revenue and the land was struck out of his patta, the only inference is according to their Lordships that he has surrendered the holding.

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1. (1913) I L R 41 C 683: 26 M L J 251 (P C).

JANAKIRAM *v.* NAGAMONY MUDALIAR, I L R 49 Mad. 98: 50 M L J 413.

While conceding that a gift can be made to a joint family as such, their Lordships hold that there is no presumption in favour of such grant in the case of a gift by a brother in favour of his divided brother and his sons and in the absence of words showing an intention to make such a grant the donees must be presumed to take as tenants-in-common. In the case of a gift by the father to the son, according to the Madras and Calcutta rulings there is such a presumption but that is because if the property came in the ordinary course of devolution, it would have been taken by them with the incidents of joint family property. Those incidents do not attach to properties got by collateral succession and as such there is no room for the presumption that the property is intended to be taken with those incidents.

One of the subordinate questions discussed in the case is as to whether there could be joint family without joint family property. Their Lordships hold there could be and they are undoubtedly right. In fact, the well-known passage of Nilakanta where he is taken to have laid down that partition is effected by a co-parcener declaring that he is divided from others relates to a family without property. "Even where there is a total failure of common property, a partition may also then be made, by the mere declaration "I am separate from thee." Vyavahara Mayukha, S. 3.

AYISWARYANANDAJI SAHEB *v.* SIVAJI RAJA, I. L. R. 49 Mad. 116: 49 M. L. J. 568.

Three important questions arose for decision in this case. (1) As to the devolution of the trusteeship of certain temples, (2) as to the devolution of the accumulations by the widows from the income of the husband's estate, (3) as to the right of the illegitimate sons of the husband to inherit to the Stridhanam of his widows. On the first question while holding that in the absence of any usage to the contrary the trusteeship would have devolved on all the heirs, their Lordships hold that having regard to the usage of the institution that only a single heir who was the Raja managed the institution, the same usage should continue and the fact of the regrant

by the British Raj to the widows (who also managed one after the other) is no justification for presuming an abrogation of the old usage. On the second question, Mr. Justice Spencer holds that there could be no question of accretion in the case when the widows were not in possession of the corpus at all but were only receiving a share of the income from the Collector, while Mr. Justice Kumaraswami Sastriar re-affirmed the current of opinion in the Madras High Court that such accumulations are presumed in the absence of evidence to the contrary to be the stridhanam of the widow—a view which has been referred to with apparent approval in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (1) by the Privy Council while the rule is stated in a contrary sense in *Nabakishore Mondal* v. *Upendra Kishore Mondal* (2). His Lordship declined to take the last as the considered opinion of their Lordships on the question having regard to the fact that no reference is made therein to the earlier decisions. As regards Mr. Justice Spencer's opinion as the accretion is not a physical accretion but an accretion to the estate, it is difficult to see why possession is material though if as it may happen in some cases, she had no right to the corpus but only to the income, the question of accretion may not arise. This does not seem to have been such a case. The appointment of a receiver at the instance of a reversioner cannot, we fancy, preclude the possibility of an accretion, any more than the fact that the property is left in the hands of a manager appointed by the widow herself. On the last question, it was argued on the analogy of the cases that hold that co-widow, step-daughter and step-daughter's son come in as sapindas, that the illegitimate son also should be entitled to succeed as the heir of the father. The argument is repelled on the ground that the cases have refused him the right of collateral succession. The ground of decision is hardly satisfactory. The growth of law on this branch has not been quite consistent. While on the one side his right to collateral succession is denied, on the other, right of survivorship on the death of the legitimate brother has been conceded to him and similarly right of representation in his legitimate issue has been recognised and lastly the right of the father to succeed to him has also been recognised. In refusing to recognise his right the Courts are still fighting shy of recognising him as sapinda and in fact, they are re-affirming the theory of the

1. (1918) I L R 42 M 581: 36 M L J 164 (P C).
2. (1921) 42 M L J 253 (P C).

early Madras cases that the illegitimate son takes by reason of the special text and by reason of his relationship as such —much in the same way as women are said to take by reason of special texts and not by reason of their relationship. He might be a sapinda or he might not be, but he is not a sapinda with any but the very qualified rights of succession conceded to him by the text.

KHALIL *v.* LES TANNERIES LYONNAISES, I. L. R. 49 M. 435 (P C).

Two questions arose in the case, both in their nature technical. The first was: A suit was filed against *A* and *B*. The first Court gave a decree against *A* but dismissed the suit against *B*. An appeal was filed by *A* and *B* against whom a decree for costs had been made by the first Court and on that appeal, the High Court dismissed the suit against *A* also. The further appeal was by the plaintiff against both *A* and *B*. Their Lordships hold that an appeal could not be filed by the plaintiff against *B* against whom the suit had been dismissed and no appeal had been filed to the High Court. The ground of their Lordships' decision is that so far as *B* was concerned there was no appeal and therefore the appeal to the Privy Council must be considered as one directly from the judgment of the first Court which it was not permissible to do under the Civil Procedure Code. The fact that under O. 41, R. 33 the Court might have exercised a power to vary the judgment against him was not sufficient to convert the appeal in the Lower Appellate Court into one against him. If the Lower Appellate Court had chosen to act under O. 41, R. 33 the case might have stood on a different footing. Their Lordships further hold that O. 41, R. 33 does not apply to the Privy Council.

The second question was one relating to the admission of evidence in appeal. On this, their Lordships could not be said to have made any unsettling sort of pronouncement but merely raise a word of caution against a too free admission of evidence in appeal.

RAJAH OF RAMNAD *v.* KAMID ROWTHAN, I. L. R. 49 Mad. 335 : 50 M. L. J. 503 (P. C.).

In this case, an important question as to the rights of occupancy tenants in trees arose.

There might be three situations in which the trees might be held. The question here was as to palmyra trees.

(*i*) They may be growing on the land held by the ryot and no mention is made of them.

(*ii*) They may be on the land held by him but the trees might be treated as a separate entity.

(*iii*) They may be let to a person on whose land they do not grow.

In the first case, their Lordships are clear that S. 12 applies and the tenant is not liable if he cuts down the tree. The ingenious distinction made between the right to cut and the right to appropriate and rejected by the High Court has apparently been also rejected by their Lordships. Equally their Lordships are clear that the tenant is liable in the third case and for the full value of the trees cut.

Their Lordships remit the case to the High Court for consideration as to what should happen in the second case.

LALA PUNJASHET *v.* MOTIRAM BUDHU, I. L. R. 50 Bom. 192.

This decision brings about uniformity in the construction of the expression "other sufficient grounds" in O. 23, R. 1 (2) (*b*) of the Civil Procedure Code by understanding it as being *ejusdem generis* with "some formal defect" in sub-clause (*a*). This has been the view held in the other High Courts as may be seen from *Aiya Koundan* v. *Gopanna Marudiar* (1), *Mahendra Ram* v. *Singi Lal* (2) and the other cases referred to in the judgment; but it is not clear what the genus of which formal defect is a species. Merely saying that the other causes must be analogous to formal defect does not give a clear idea as to what those causes might be. Again the formal defect referred to in sub-rule (*a*) must be such as to cause the dismissal of the present suit; but the other grounds referred to in sub-rule (*b*) are not such as would cause a failure of the present suit but grounds for allowing the institution of a fresh suit on the same subject-matter. It may be a question whether the rule of *ejusdem generis* can be applied when the purposes differ and are not similar as stated above. No doubt the word "other" in sub-clause (*b*) would seem to suggest in the case mentioned in sub-clause (*a*) a fresh suit may be instituted. On the nature of the rule of *ejusdem generis* in the construction of statutes, deeds, etc., we would refer to the exhaustive treatment of it by McCardie, J. in *SS. Magnhild* v. *McIntyre Brothers and Co.* (3) to show the extent of obscurity in which the rule is involved. It is however settled before the rule can be applied that one should be able to settle the genus of which the previously mentioned categories form species. If that is not possible the general words cannot be restricted in their meaning. Again the previous words should not exhaust a genus by themselves. The learned Judges have referred to *Chhaju Ram* v. *Neki* (4) in support of the *ejusdem generis* construction. To show that the rule is not inflexible we would refer to *Shankar Ganesh Dabir* v. *Secretary of State for India* (5), where the *ejusdem generis* rule was not adopted. Reference may also be made to the judgment of Hill, J. in *Le Mesurier* v. *Wajid Hossain* (6) as to the limits of the application of

1. (1914) 27 M L J 480. 2. (1918) 3 P L J 651.
3. (1920) III K B 321.
4. (1922) 49 I A 144: 43 M L J 332 (P C).
5. (1922) 49 I A 319: 49 C 845: 44 M L J 32 (P C).
6. (1902) I L R 29 C 890 (F B).

the rule. It may also be doubted whether any serious consequence would result even if the *ejusdem generis* rule is not adopted in this case as the matter rests in the discretion of the Court whether the leave to institute a fresh suit is to be given or not in each case. We would in this connection draw attention to the observations of Sadasiva Aiyar, J. in *Kannuswami Pillai* v. *Jagadambal* (7) on this question.

FRAMROZ EDULJI *v*. MAHOMED ESSA, I. L. R. 50 Bom. 266.

It is somewhat remarkable that the view of the Madras High Court in *Best* v. *Haji Muhammad Sait* (8) that interest on a promissory note payable on demand, where no interest is provided for, runs only from the date of demand and not from the date of the promissory note itself under S. 80 of the Act, has gone without challenge, so long. Even Messrs. Bhashyam and Adiga in their commentaries on the Negotiable Instruments Act have cited that case without comment. It is well settled that when the expression "on demand" is used in a promissory note, it means that the note is payable immediately on its execution and no demand is necessary before payment is due. See *Seetharamayyar* v. *Muniswami Mudaliar* (9) and *Norton* v. *Ellam* (10). *Cf*. Art. 73 of the Limitation Act. If therefore no demand is necessary to render the amount under the note payable, it seems difficult to support the decision in *Best* v. *Haji Muhammad Sait* (8) and the learned Judges in this case have, if we may say so with respect, rightly dissented from the ruling and come to the conclusion that interest at 6 per cent. per annum is payable in such a case from the date of the execution of the note itself.

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7. (1918) I L R 41 M 701: 35 M L J 27.
8. (1899) I L R 23 M 18. 9. (1919) M W N 185: 9 L W 427.
10. (1837) 2 M & W 461.

PARBATI CHARAN MUKHERJEE *v.* AMARENDRA NATH BHATTACHARJEE, I. L. R. 53 Cal. 418.

This decision is useful as indicating the limits of the rule avoiding an instrument by reason of its material alteration. The law on the subject in this country is derived entirely from the English decisions, and the review of the English cases on this question by the learned Judges will therefore be found particularly helpful. A material alteration of a document after its execution by or with the consent of any party thereto or any person entitled thereunder but without the consent of the party or parties liable thereunder renders the deed void with the result that no action can be maintained on the instrument. The avoidance, however, does not prevent the instrument being used for proving a collateral fact as, for instance, the acknowledgment of a pre-existing liability to pay a sum of money, even though it may be to the person who made the alteration, provided the obligation sought to be enforced is not one arising on the covenants in the instrument. If, however, the pre-existing obligation is merged in the instrument materially altered, all rights would be extinguished by the material alteration. These are the principles given effect to by the learned Judges in the case, where the pre-existing liability was not merged in the mortgage bond and the acknowledgment of the pre-existing liability in it was allowed to be given in evidence in a suit based on the original liability ; and the learned Judges consequently granted a money decree.

There is one other aspect of this branch of the law that we wish to draw attention to. The avoidance in the case of a materially altered document is not, it must be noticed, *ab initio* or so as to nullify any conveyancing effect. Reference may be made in this connection to *Hipkins* v. *The Birmingham Gas Light Company* (1) where it was held that notwithstanding a subsequent cancellation of a lease deed, the lessor could recover the rent as it was incident to his reversion created by the lease. *See* also Norton on Deeds, pp. 29 to 31 for a full discussion of the question and the cases bearing on the same. So that, if by the conveyance prior to the date of the material alteration any interest became vested in the mortgagee, vendee or lessee, it will not be divested on a material alteration of its terms. The result will be that in this case there will be a valid mortgage on the property created at the time of the original execution of

1. (1860) 5 H & N 74 at 87.

the mortgage, if the property mortgaged was movable property. If the property was immoveable, it may be a question whether by reason of registration of the document on a date subsequent to the alteration its operation takes effect on the document from the time of its original execution and prior to the alteration, by virtue of S. 47 of the Registration Act. If by such relation back, the document becomes a duly registered document at the moment of its original execution itself, the mortgage interest that may thereby become vested in the mortgagee cannot be divested by the subsequent alteration. It would then be a further question how far the mortgage right so vested can be enforced by suit. It has been held in such a case the person entitled cannot enforce the covenants contained in the materially altered document. Cf. *Davidson* v. *Cooper* (2). But supposing under a usufructuary mortgage, or an English mortgage, the mortgagee had entered into possession, he cannot be ousted from possession and it would also seem he can even recover possession on foot of his title. This branch of the rule has obviously no application to the case on hand as what is sought to be enforced is the covenant under the mortgage bond which, as pointed out above, cannot be enforced by reason of its material alteration.

PURSHOTAM HURJIWAN *v.* NAVNITLAL HURGOVANDAS, I. L. R. 50 Bom. 275.

The questions discussed in this case are of great interest on the law of contempt of Court. An application was made by a Hindu husband for the custody of his wife from her parents. The matter was heard *in camera* by a Judge on the original side sitting in chambers. The Judge having no time to deliver a detailed judgment expressed his conclusions and said that he would give his reasons on a later date. Between the two dates, one of the parties published a report of the proceedings which was inaccurate in some respects; and an application was made to commit him for contempt. The Trial Judge and the Appellate Bench both held that the party was in contempt. Prior to the decision of the House of Lords in *Scott* v. *Scott* (3), it was held in England, that Courts had an inherent jurisdiction to hear cases *in camera* and this right was frequently exercised in matrimonial cases; so much

2. (1843) 11 M & W 778 at 800.

3. (1913) A C 417.

so, hearing cases *in camera* became a rule of practice whenever Judges in any jurisdiction thought that such a course was called for. When the whole question came up for review before the House of Lords in the above case, it was examined by the noble Lords from all points of view and it was held that except in cases relating to wards and lunatics and in cases of trade secrets and possibly also in some cases where justice could not be done if the hearing is in public, there is no jurisdiction in any Court to hear cases *in camera;* and the publication of the proceedings held *in camera* in a suit for nullity of marriage was held not to be a contempt of Court, although there was a consent order for a hearing of the case in private. In the present case there can hardly be any doubt that a publication of matter which was not an accurate report of the proceedings, especially before the delivery of the final judgment in the case would amount to a contempt of Court. But if the case is to be understood as laying down anything more, the matter is not without difficulty. Taking it for the present purpose that the proceedings had terminated and there was nothing inaccurate in the report, an order to conduct the hearing *in camera* does not put a ban of secrecy for all time in future. This is made perfectly clear by the House of Lords themselves; otherwise even the report of the case itself in the Law Reports may become a contempt as Lord Shaw remarked in the same case. It may be noticed in passing that the guardianship case itself in the present instance is reported in *Navnitlal Hurgovandas* v. *Purshotam Hurjiwan* (1).

Again, if as Lord Halsbury observed in the case, the proceedings of the Court when exercising jurisdiction in matters of wards have no relation to the public administration of justice but the Judge merely acts as an arbitrator dealing with family disputes, it may be a question whether the principles of the law of contempt as applicable to Courts of justice can be applied to the case. It is not clear whether the law of contempt can be applied to the case of a domestic forum like a caste panchayat. But it is possible that in the cases of guardians and wards the Court fills the dual capacity of a Court of justice and of administering the affairs of the ward as pointed out by the Lord Chancellor, Lord Haldane.

On the question of the disclosure of proceedings in chambers other than the specified cases of wards, lunatics and

1. (1925) I L R 50 B 268.

trade secrets, the learned Judges have reserved their opinion in the present case. But with all respect, we venture to think that the practice of secrecy and non-disclosure of those proceedings are entitled to no more consideration than the practice which had grown up in the English Courts about hearing cases *in camera* and the non-disclosure of those proceedings which was, despite, declared to be illegal and without jurisdiction and which even the consent of parties would not cure, as pointed out and explained by the House of Lords. After the examination of the question by Lord Shaw in the House of Lords case, there seems to be nothing to be said in favour of the legality of the practice said to be prevailing in the Bombay High Court of keeping private the proceedings and decisions arrived at in chambers in respect of all matters.

NAND LAL SARAN *v.* DHARAM KIRTI, I. L. R. 48 A. 377.

The question in this case was as to the proper construction to be put upon Explanation I of Art. 182 of the Limitation Act. A decree had parts. Part of it was jointly passed against all the defendants and in another part it was passed severally against the various defendants. The question was whether application in respect of the latter portion will save limitation as regards the former portion. Their Lordships hold, not. They think that neither part of the explanation applies to the case if you take the words literally. They would take each part and apply the explanation to that part. In other words, they would treat the joint portion of the decree as a joint decree, and several portion of the decree as a several decree. *Prima facie* the conclusion seems reasonable. The Madras High Court in *Subramania Chettiar* v. *Alagappa Chettiar* (1) apparently takes a different view and holds that if any part of the decree is joint, the decree must be treated as a joint decree. The case itself was one in which there were two parts—one part a joint decree against three people and another part a joint decree against two of them—so that the case was one of joint decree. But the case has been taken as laying down the wider position. See *Pattannayya* v. *Pattayya* (2). The same view is taken by the Calcutta High Court in *Barada Kinkar* v. *Nabin Chandra* (3). This much is to be said in favour of that view that apart from the explanation there is no reason to confine the saving quality to applications against the particular person or in respect of any particular subject-matter. The explanation restricts the operation of the article against the subject. The proper way of construing it is to take it literally. If it applies to a particular case in terms, all right and good. If it does not, there is no reason why the article should not be taken to apply unqualified by the explanation which comes to the same thing as saying that the definition of a joint decree is to be applied to all cases to which the other definition does not apply.

EMPEROR *v.* KALWA, I. L. R. 48 All. 409.

In this case, the Allahabad High Court prefers the ruling of the Calcutta High Court in *Emperor* v. *Ashootosh Chuckerbutty* (4) that a conviction should not be based on the uncorroborated confession of a co-accused to that in *Emperor* v. *Kehri* (5) that such a conviction is

1. (1906) I L R 30 M 268.
2. (1925) 50 M L J 215.
3. (1909) 11 C L J 85.
4. (1878) I L R 4 C 483.
5. (1907) I L R 29 A 434.

not unlawful or improper. Corroboration according to their Lordships must point to the identification of the person charged with the particular act. This is in accordance with the general trend of opinion in the other High Courts.

RAM SAHAI *v.* MADAN LAL, I. L. R. 48 All. 432.

In this case their Lordships were put to considerable difficulty by the Full Bench judgment in *Yad Ram* v. *Sundar Singh* (1). The Lower Courts decided that a mortgagee of a decree was not entitled to apply under O. 21, R. 16 to execute the decree, following some ruling of the High Court which their Lordships are at pains to show did not apply to the facts of the case. This, they consider, sufficient for them to interfere with the judgment of the Lower Court. In plain English, the Lower Court had committed an error of law. If, as the Full Bench held, an erroneous construction put upon the Statute by which the particular application was held not to be entertainable was not a question of jurisdiction, illegality or material irregularity, this was *a fortiori*. But we agree that the decision of the Full Bench is wrong and requires re-consideration.

SHEO PRASAD *v.* NARAINI BAI, I. L. R. 48 All. 468.

This case adds a new terror to decree-holders whose troubles begin, as observed by the highest judicial authority, only after the judgment. Their Lordships seem to hold that an application for execution made merely with intent to keep the decree alive and not really to carry on execution cannot save limitation because according to them such an application is not a *bona fide* application for execution. The curious part of the decision is that it ignores decisions that hold to the contrary and purports to rest upon decisions which do not seem to lay down any such rule. Soon after the Act of 1871 was passed in *Rohini Nundun Mitter* v. *Bhugwan Chunder Roy* (2), Markby and Romesh Chunder Mitter, JJ. expressly laid down that absence of *bona fides* is not a ground for disregarding an application under the Act of 1871. This led to the Full Bench decision in *Eshani Chunder Bose* v. *Prannath Nag* (3) where the Full Bench upheld the principle laid down in

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1. (1923) I L R 45 A 425 (F B) 2. (1874) 22 W R 154.
3. (1874) 22 W R 512 (F B).

Rohini Nundun Mitter v. *Bhugwan Chunder Roy* (2). This view was re-affirmed in *Shurut Chunder Sen* v. *Abdool Khyr Mahomed Mohutesur Billah* (4) and referred to as the law in *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (5). After this the legislature re-enacted the Limitation Act twice and yet no indication is given that these decisions are disapproved of. On the other hand, the language on which the decisions of the Act of 1859 proceeded, "enforce the decree" has been altered into "applying in accordance with law to the proper Court for execution". *Roy Dhunput Singh* v. *Mudhomotee Dabia* (6) and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (7) are decisions under the Limitation Act of 1859. *Chattar* v. *Newal Singh* (8) is a case on the construction of the words "in accordance with law" and lays down that an application to the Court to give something which it can under no circumstances give is not an "application in accordance with law". The other cases no doubt refer to *bona fides* but that is not for the purpose of a restrictive interpretation so as to exclude even perfectly good applications but for the purpose of extending the article to cases where the relief asked for is not competent or proper for the Court to grant or the application is defective. The words "in accordance with law" are considered as giving the Court considerable latitude with respect to defective applications. It is here that *bona fides* come in. To interpret the article in the manner the Court has done in this case is to forget that the Limitation Act is an enactment of a restrictive character and should be strictly construed. The Court has no right to interpolate words which are not in the article. All that the Court is entitled to see is whether the conditions prescribed by the article have been satisfied. The conditions are previous application for execution or application to take a step-in-aid of execution in accordance with law or issue of notice. If these conditions are satisfied it has no right to consider whether the application was *bona fide* or not. The Court could not have dismissed the application whether the application was *bona fide* or *mala fide*. It cannot also treat it as *non est*. The issue of notice is one of the starting points. Could the Court introduce question of *bona fides* there? If it could not, for the same reason it could not in the other cases.

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2. (1874) 22 W R 154.
4. (1875) 23 W R 327.
5. (1875) 23 W R 282.
6. (1872) 11 Beng. L R 23 (P C).
7. (1881) I L R 8 C 51.
8. (1889) I L R 12 A 64.

NIRMAN SINGH *v.* LAL RUDRA PRATAP SINGH, I. L. R. 48 All. 529 (P. C.).

This is a somewhat obscure judgment. The facts were : On the death of the father there was some dispute between the sons as to mutation—the eldest claiming to be solely entitled on the ground that the estate was an impartible one, while the others alleged the property to be ordinary partible property in which all were equally entitled. The Extra Assistant Commissioner made an order recording his name as lambardar and that of others as co-sharers. On appeal, the Deputy Commissioner cancelled the entry of the names of the brothers leaving them to claim their share in the estate by proper proceedings. The brothers lived jointly with the eldest brother and latterly were being paid maintenance. The question, under the circumstances, was, whether the brothers could be said to have been excluded. The Sub-Judge held, following the Belgaum case, that the other members could not be held to be excluded. The Judicial Commissioners held the contrary, misconceiving the effect of the order in the mutation proceedings. Their view was that the eldest brother asserted exclusive right and that position having been accepted by the Revenue Officer, further possession of the eldest brother was adverse to the other brothers. Their Lordships point out that the true function of the mutation proceeding is to give possession to some person for fiscal purposes and that it has not the effect of determining any rights *inter se*, and that as a matter of fact also, it left the rights of parties unaffected. The view of the Privy Council apparently is that though the eldest brother asserted an exclusive right, he was put in possession by the Revenue Authority for its own purposes, leaving the rights of parties unaffected and so far as other brothers were concerned, they being in receipt of allowances, they were not excluded and therefore there was no question of limitation. His assertion could not alter the nature of his possession. Some such must be their Lordships' view because their Lordships concede that the brother asserted an exclusive right but point out that the Revenue Authority did not accept his assertion and one fails to see otherwise any explanation of *Raghunath Bali* v. *Maharaj Bali* (1) which would have applied.

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1. (1885) I L R 11 C 777.

JOGESH CHANDRA ROY *v.* ANNADA CHARAN CHAUDHURY, I. L. R. 53 Cal. 590.

The exact point that arose in this case does not seem to have come up for decision before, either in this country or in England. A lease deed for a term of six years provided that the lessee, his heirs or assigns should be entitled to an option for a renewal for similar term of years and so on after each such subsequent lease on certain terms. It is immaterial in this connection to refer to the death of the lessee or the assignment by the lessee's heirs as they make no difference. A covenant for a renewal of lease itself runs with the land and with the reversion. Again an option for perpetual renewal is not unknown to law though Courts will lean against construing a clause as giving a right of perpetual renewal. ***Baynham*** v. *Guy's Hospital* (1). The lessee in this case continued in possession after the original term of six years as tenant without a renewal being applied for or obtained. He so continued in possession for more than six years and the question was whether he was entitled to the right of renewal under the lease deed after twelve years. The learned Judges have answered it in the negative. It is well settled that in a case where a lessee has an option of renewal, it is open to the landlord to call upon the lessee whether he is willing to exercise his option of a renewal and, in default, to put an end to the lease. *Hersey* v. *Giblett* (2). It is equally settled that the expiry of the original term and the continuance in possession thereafter of the tenant would not by themselves disentitle the option from being exercised by the lessee. ***Moss*** v. ***Barton*** (3). If, however, the renewed term would have determined when the relief to the lessee is to be given in a suit he would no longer be entitled to remain in possession under the covenant for renewal. *Jardine Skinner & Co.* v. *Rani Surat Soondari Debi* (4). The present case goes one step further than all these, as, though the first term of renewal would have terminated, the tenant, if he had obtained a renewal of the lease, would have been entitled to a further option of renewal ***ad infinitum***. The learned Judges have held that in such a case, he is not entitled to exercise the option any longer, if he did not exercise his option on the previous occasion and obtained a lease thereunder.

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1. (1796) 3 Ves Jr 295: 30 E R 1019 2 (1854) 18 Beav 174: 23 L J Ch 818.
3. (1866) L R 1 Eq. 474. 4. (1878) L R 5 I A 164.

FAKIRGOWDA *v.* VISHNUDAS, I. L. R. 50 Bom. 326.

In this case, the defendant failed to pay the amount of costs under a conditional order that an *ex parte* decree would be set aside if the defendant paid within a time fixed the costs of the plaintiff and the application to set aside the *ex parte* decree was consequently dismissed and the question arose whether this order of rejection was appealable under O. 43, R. 1 (*d*) of the Civil Procedure Code. The learned Judges have answered it in the negative. We are not sure when a conditional order is passed, it may not be open to argument on the one side that it is an order setting aside the *ex parte* decree on the payment of costs and on the other side that it is impliedly an order refusing the application if payment is not made. Cf. *Nannhu Mal* v. *Gulabo* (1). Such a bifurcated order cannot be definitely said to be an order of rejection which is the only order appealable under O. 43, R. 1 (*d*). That is why the Madras High Court in *Venkataswami Naidu* v. *Shanmugam Pillai* (2) and *Rajagopalachari* v. *Narasimha Thathachari* (3) and the Allahabad High Court in *Jagannath Sastri* v. *Kamta Prasad Upadhya* (4) have held that the proper course for the Court under O. 9, R. 13, is to direct the payment of costs or furnishing of security at the first instance and subsequently on the non-compliance of the direction to make an order rejecting the application to set aside the *ex parte* decree. If such a procedure is followed there will be a definite order of rejection which will be clearly appealable. No doubt when such an order is appealed against, the order as to payment of costs, etc., being in the discretion of the first Court would not *ordinarily* be interfered with by the appellate Court. It is needless to point out that a discretion vested in any Court may be interfered with by another tribunal in proper cases. Reference may be made in this connection to the observations of Lord Halsbury on the interference with the discretion vested in other Courts or public bodies in the well-known case of *Sharp* v. *Wakefield* (5). We do not think that anything that has been said by the learned Chief Justice in the case under review can be understood as running counter to those observations.

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1. (1903) I L R 26 A 175.
2. (1917) 6 L W 757.
3. (1925) 88 I C 196.
4. (1913) I L R 36 A 77.
5. (1891) A C 173 at 179-81.

GURUSHANTAPPA *v.* GURUVA, I. L. R. 50 Bom. 339.

The Select Committee on the present Civil Procedure Code reported that S. 99 of the Transfer of Property Act should be repealed altogether and not retained even in its present form as O. 34, R. 14, as it has always been understood even prior to the enactment of S. 99 in the Transfer of Property Act, that under a decree on the personal covenant in a mortgage bond, the entire property and not merely the equity of redemption should be sold in execution, *Khiarajmal* v. *Daim* (1) and no protection was thus needed to the mortgagor against the mortgagee selling the equity of redemption alone keeping the mortgage interest in himself. Some difficulty might arise in cases where the mortgagor had created subsequent incumbrances or sold the equity of redemption. In those cases no protection is needed from the point of view of the mortgagor, but only the mortgagee will suffer if he does not bring a suit under S. 67 of the Transfer of Property Act impleading all the necessary parties as he will then not be able to work out his rights fully. But the legislature has thought fit to retain the provision as we have it in O. 34, R. 14 of the Civil Procedure Code. Even under this rule, one of the necessary requisites for its applicability is that there should be a mortgage or charge prior to the decree itself as pointed out in *Official Receiver, Tanjore* v. *Nagaratna Mudaliar* (2) and *Indramani Dasi* v. *Surendra* (3). If therefore the mortgage or charge comes into existence by the decree itself or subsequent to the decree sought to be executed as in the case under notice O. 34, R. 14 can obviously have no application. In cases where a third person binds himself personally and stands surety for the judgment against another and gives his property as further security, the decree that is executed against the surety is under S. 145 of the Code really the one passed originally against the judgment-debtor and not a fresh one after the giving of the surety bond. This is really stating the ground of decision of the learned Judges in the present case in another form. The *ratio decidendi* of *Amir* v. *Mahadeo Prasad* (4) is with all respect irreconcilable with that of *Mukta Prasad* v. *Mahadeo Prasad* (5), but the former decision can be supported on the ground that the interest of the surety in the properties given as securities became vested

1. (1904) I L R 32 C 296: 32 I A 23. 2. (1925) 49 M L J 643.
3. (1921) 35 C L J 61. 4. (1916) I L R 39 A 225.
5. (1916) I L R 38 A 327.

in other persons and there can therefore be no effective remedy against the properties without a suit under S. 67 of the Transfer of Property Act against the various owners of the equity of redemption. If, in the present case, the property given as security were subsequently sold to a third person, the procedure under S. 145 would obviously not entitle the decree-holder to sell the property in the hands of the third person and he would necessarily have to sue on the charge or mortgage in the proper form. The exact question that arose in this case did not come up for consideration in *Official Receiver, Tanjore* v. *Nagaratna Mudaliar* (2) as the other person whose property was given as security was the son of the judgment-debtor whose property could have been proceeded against in execution of the original decree itself and the learned Judges therefore leave the present question open. The Patna High Court has taken the same view in *Babu Ganga Deo Narain* v. *Joti Lal Sahu* (6) and *Madho Prasad* v. *Chandrabati Kuer* (7). We would in this connection only refer, in addition to the case in *Musammat Chandrabati* v. *Madho Prosad* (8) and submit that the view taken therein is not inconsistent with the decision under notice.

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2. (1925) 49 M L J 643.
6. (1917) 2 P L J 197.
7. (1917) 38 I C 130.
8. (1914) 19 C W N 178.

MASIT-ULLAH *v.* DAMODAR PRASAD, I. L. R. 48 All. 518 (P. C.).

In this case, their Lordships reject the distinction made between the liability of the son, grandson and great-grandson in respect of the obligation to pay the ancestor's debts from joint family or ancestral estate. Their Lordships hold that the right by birth and the obligation to pay are co-extensive and the distinction is good only if the Hindu law liability is sought to be enforced independently of the possession of ancestral assets which cannot of course be done in British Indian Courts now.

In this case, the sale was for Rs. 18,400 and in the view taken by the Privy Council, the consideration to the extent of Rs. 16,000 was for the discharge of binding debts. The balance of Rs. 2,000 remained unaccounted for though the amount was shown to have been paid to the father. On the finding that the son was living with the father and the suit was collusive one and the father's evidence which would have been material had been withheld and a substantial portion of the consideration had been found binding, their Lordships dismissed the suit of the son wholly. The Sub-Court on the same view released a share of the property proportioned to the part of the consideration found not binding. This, their Lordships say, was unworkable, agreeing with the High Court in this matter; whether they also mean incompetent is more than one can say.

RAMIAH *v.* VENKATASUBBAMMA, (1925) I. L. R. 49 Mad. 261 : 50 M. L. J. 308 (F. B.).

It is S. 187 of the Succession Act which provides that no right as executor or legatee can be relinquished unless a Court of competent jurisdiction shall have granted a probate of the will under which the right is claimed, " that compels the executor in the case of wills coming under that Act to take out probate. For even in those cases it is not the probate that confers the power on the executor to deal with the estate but the will [*Meyappa Chetty* v. *Subrahmanya* (1)] and the vesting section 188 makes no reference to the grant of probate. In the Probate and Administration Act there is no section corresponding to S. 187 but there is the section corresponding to S. 188 without any reference again to the grant of probate. S. 12 no doubt is worded as if the grant of probate validates inter-

1. (1916) A C 603.

mediate acts of the executor as such but then it is not to be forgotten that the Act applies to some wills where the taking out of probate is compulsory. That would seem to be sufficient explanation for the wording and there is this undoubted fact that there are numerous sections of the Act that must be applicable to wills whether probate is taken out or not. *See* Chapter XI. There are further, as pointed out by Mr. Justice Kumaraswami Sastri, J., certain practical difficulties in holding that the provisions of the Act apply only to executors who have taken out probate with reference to the acts done by them if their validity is to be made dependent upon the accident of their taking out probate. On the whole we think the view of the Full Bench that the provisions of the Act apply to executors who have not taken out probate as well as those who have, excepting of course those sections that professedly deal with executors who have taken out probate, is the view, most consistent with both principle and convenience.

VENKATESAM CHETTY *v.* GULAB CHAND, (1925) I. L. R. 49 Mad. 291 : 50 M. L. J. 190 (F. B.).

After the judgment of the Privy Council in *Sabitri Thakurain* v. *Savi* (1) the point was unarguable that O. 41, R. 22 would not apply to Original Side appeals.

SANJEEVA REDDI *v.* KONERI REDDI, (1925) I. L. R. 49 Mad. 315 : 50 M. L. J. 460.

This is a somewhat interesting case. The defendant was sued for damages for making certain defamatory statements, first in an application to the Magistrate to take security proceedings ; secondly, before the Police Officer to whom the matter was referred for investigation. The question was whether the statements were absolutely privileged. The first being to a Court to initiate a judicial proceeding for the protection of the defendant, there was little difficulty in holding that it was privileged. For the second, there was more difficulty in that the privilege conferred by S. 161 did not apply, for it was not an investigation contemplated by that section. Their Lordships hold that the privilege applies on the analogy of statements by witness to parties, their agents or their solicitors as a preliminary to their examination in Court which have been held privileged by the House of Lords in *Watson* v. *McEvan* (2).

1. (1921) I L R 48 C 481: 40 M L J 508 (P C).
2. (1905) A C 480.

CHIDAMBARA THEVAR *v.* SUBBARAYAR, (1925) I. L. R. 49 Mad. 508 : 51 M. L. J. 139.

Is a mortgage decree a decree for the payment of money? It might undoubtedly become one, if there is a personal covenant, when the security is exhausted and a balance remains due. So long as that stage is not reached, there is no decree for payment of money. The same view is taken, we see, in *Rajarathna Naidu* v. *Ramachandra Naidu* (1). O. 21, R. 36 contemplates the enforcement of a decree for payment of money by arrest. It might look somewhat strange that though there is a prohibition against execution by a judgment-debtor when money decree is transferred to him, if a mortgage decree is assigned to a judgment-debtor he should be in a position to obtain a decree under O. 34, R. 6 which he may execute against the others. But this does not necessarily follow. The prohibition of the section might not apply but there is nothing to prevent the Court from considering the question whether by reason of the transfer, the decree has ceased under the general law to be executable in whole or in part, or whether by reason of such a transfer the money has ceased to be "legally recoverable" from others within the meaning of O. 34, R. 6. Even in the case of the mortgage decree, if the assignment is in favour of the person primarily liable there is nothing to prevent the Court from holding that the decree should not be executable by him. The prohibition under O. 21, R. 16 is an absolute one and has no regard to the special circumstances of the case. It makes no distinction between judgment-debtors primarily liable and secondarily liable, between execution for the aliquot share of the decree for which the other judgment-debtors are liable and execution for the full amount. All these distinctions are available for consideration by the Court when the objection is taken under the general law.

VENKATASUBBA MUDALI *v.* MANICKAMMAL, (1925) I. L. R. 49 Mad. 513 : 50 M. L. J. 364.

It is one thing to say that an agreement prior to decree that a decree should be passed but when passed should either not be executed against the contractee or not be executed for some time should not be permitted to be pleaded at all being

1. (1924) I L R 47 M 948 : 47 M L J 434.

inconsistent with the decree. That is the view which has commended itself to the Rangoon High Court. It is quite another thing and to us is wholly unintelligible why or how on principle any distinction could be made between an agreement not to execute the decree and an agreement not to execute for a time. The decree as it stands is executable and an agreement not to execute it for a time contradicts it quite as much as a decree not to execute at all. We do not believe that even those Courts that hold that such an agreement is pleadable in execution would allow it to be pleaded if it could have been pleaded as a defence to the suit itself. Such a thing as a contract not to sue as distinguished from a release is well known and a man might well agree to have a decree passed and at the same time might enter into a contract that the decree should not be executed. If the arrangement is with a view to commit fraud on a third party, there might be difficulty in enforcing such an agreement but where no fraud is intended and the arrangement is merely to protect the party entering into the contract without at the same time effecting a settlement of the claim there is no reason why it should not be enforced. Such a thing will ordinarily happen when there are others jointly bound. Such an arrangement would be quite good under the English Law as a contract not to sue out execution against one without at the same time releasing the claim altogether.

SATYANARAYANA *v.* CHINNA VENKATRAO, (1925) I. L. R. 49 Mad. 302 : 50 M. L. J. 674.

We quite agree that when the vendee under an agreement of sale comes into Court and says that he had a sale deed executed by the defendant in his favour which he could have got registered under the provisions of the Registration Act, it is not open to him to ask the Court to direct the defendant to execute another document and register it. The defendant never stipulated for it and the plaintiff could not therefore insist upon it. If the defendant did not take any of the steps which he ought to have, the plaintiff had his remedy under the Act, and if he failed to avail himself he has no other remedy. If, for no fault of the plaintiff, the remedy under the Act is not available to him, either because the document has been fraudulently withheld by the defendant or is destroyed owing to no negligence of the plaintiff, he may have his remedy of specific performance. In this case what happened was apparently that the document was not registered because the defendant denied execution. Is it not open to the plaintiff to take the defendant at his word and ask him to execute a proper conveyance ? If the plaintiff persisted in saying that the conveyance is good, he is on his own showing out of Court but if he did not and relied upon the word of the defendant, is there anything to prevent the Court from giving him the relief ? We think not.

HARIDAS NARAYANDAS *v.* DEVKUVARBAI, I. L. R. 50 Bom. 443.

This is a decision of considerable interest on Hindu joint family law and shows that an ancestral nucleus of property is not essential before the earnings of joint family members can become joint family properties. A Hindu father with no ancestral nucleus of property started business and made some fortune. A son was afterwards born to him and the father and the son having common mess and worship, did business together and earned considerable properties thereby. The first question was whether under these conditions the properties earned were the joint family properties of the family composed of the father and the son with all their incidents or were properties held by them in joint tenancy or tenancy-in-common. The learned Judges held that in such circumstances the properties were owned by them as joint family properties with the right survivorship and right by birth in

persons that might be subsequently born in the family. Although the contrary was held in *Chatturbhooj Meghji* v. *Dharamsi Naranji and Harjivan Dharamsi* (1) and adopted by Mayne in the earlier editions of his work on Hindu Law, it was held by the Privy Council as early as *Ram Pershad Tewarry* v. *Doss and others* (2) and by the Madras High Court in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (3), *Gopalaswami Chetti* v. *Arunachalam Chetti* (4), that under these circumstances the properties earned would be joint family properties. To have this effect, however, it was pointed out by Bhashyam Aiyangar, J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (3) that all the then members should have joined in the business and that if only some of the members of the family earned by their exertions without joining the others in the business, the properties so acquired would not be joint family properties but would be the joint properties of the acquirers alone in which their sons would get no interest by birth. We do not believe that the doubts that may have been cast on some other observations of the judgment of the learned Judge by some of the later pronouncements of the Privy Council, have any bearing on this part of his judgment.

Coming to the second point dealt with by the learned Judges, *i. e.*, as to the validity of a gift to a daughter by a father and manager of a joint Hindu family of immoveable properties of the family to a reasonable extent, not having been made on the occasion of marriage or other auspicious ceremonies, the Madras High Court has uniformly upheld such gifts—not merely such gifts, but gifts of family immoveable properties to a sister by a brother and also gifts made to a son-in-law. Notwithstanding the attempts made in *Sundararamayya* v. *Sitamma* (5) and *Ramaswami Aiyar* v. *Vengiduswami Aiyar* (6) to support them by reference to Hindu Law texts, it is not clear whether they have really anything more than the enlightened consciousness of the community to support them, because the passages of Mitakshara, Ch. I, S. 1, verses 27 to 29 and Ch. I, S. 7, verses 6 to 14 are not clearly in favour of gifts of family immoveable properties by a father; and even allotments by brothers of the one-fourth share to unmarried sisters are now obsolete. Reference may in this connection be usefully made

1. (1884) I L R 9 B 438.
2. (1866) 10 M I A 490 (506).
3. (1901) I L R 25 M 149: 11 M L J 353.
4. (1903) I L R 27 M 32.
5. (1911) I L R 35 M 628: 21 M L J 695.
6. (1898) I L R 22 M 113: 8 M L J 170.

to the arguments reported in *Anivillah Sundararamayya* v. *Cherla Seethamma* (7). Again such gifts to other female members have not been countenanced even in Madras. See *Movva Subbarao* v. *Movva Ademma* (8). Although it may be difficult to find authority for the validity of such gifts in the texts of Hindu Law, after the pronouncement of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi* (9) affirming *Narayana* v. *Ramalinga* (10) their validity need not have been left in doubt by the Bombay High Court in the case under notice and upheld on the narrow ground of the son's acquiescence in the gift by the father.

MALLAPPA VENKATESH *v.* JANARDAN, I. L. R. 50 Bom. 450.

In this case the learned Judges have held that in the case of leases with a covenant for forfeiture and a condition of re-entry by the landlord, in the event of assignment or parting with possession of the leased properties by the tenant, the Courts have power in equity to relieve the tenant against forfeiture, although no case of fraud, surprise, accident or mistake was set up by the tenant as having led to the breach of the covenant. It does not appear from the report whether the decisions of the English Courts were cited before the Court ; and we venture to think that if the attention of the learned Judges have been drawn to the relevant authorities on the question, they would have come to the opposite conclusion. In the Courts of Common Law, though they leaned against forfeiture, a covenant in a lease for forfeiture and a condition for re-entry were always enforced, when a breach of the covenant was strictly proved. But from very early times Courts of Equity relieved against forfeiture in cases of covenants for forfeiture and re-entry for non-payment of rent. This we find in S. 114 of the Transfer of Property Act which applies to cases of leases governed by the Act. To cases exempted from the Act, the rule of equity so well recognised in England would be applied relieving tenants in cases of forfeiture for non-payment of rent. In other cases of forfeiture, as for instance under covenants not to alienate or part with possession or for repairs, Courts of Equity

7. (1911) 21 M L J 695. 8. (1924) 47 M L J 465.
9. (1922) I L R 45 M 489: 43 M L J 482 (P.C). 10. (1915) I L R 39 M 587.

have held that they have no power to relieve the tenant from forfeiture, except when the breach of covenant was occasioned by fraud, accident or surprise or by mistake as understood by that term in the equitable doctrine. This was clearly laid down by Lord Eldon in *Hill* v. *Barclay* (1). There are also direct authorities on the question dealing with a covenant for forfeiture and a condition for re-entry in cases of assignment by the lessee or his parting with possession. See *Wafer* v. *Mocato* (2), *Hill* v. *Barclay* (1) and *Barrow* v. *Isaacs and Sons* (3). The result of the English decisions in equity may be shortly stated that in cases of wilful breaches of covenant, equity will not relieve against forfeiture. There are, however, statutory provisions in the Settled Land Act and other enactments restricting forfeiture for breach of covenant by lessee in certain instances and under conditions imposed thereby. But they have no application to this country. It may also be noticed in this connection that a covenant or condition against the assigning, under-letting, parting with the possession or disposing of the land leased, is expressly exempted from the operation of the Settled Land Act by sub-section 6 (1) of S. 14 of the Act, with the result that in these cases the rule in England still is that except in cases of surprise, fraud or accident, there can be no relief against forfeiture.

[END OF VOLUME LI.]

1. (1810) 18 Ves 56. 2. (1724) 9 Mod 112. 3. (1891) 1 Q B 417.